(2)

No. 08-1155

In The

Supreme Court of the United States

WILLIAM B. ROOZ,

Petitioner,

v.

DAVID KIMMEL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED
(As Presented by the Petitioner)

1. Does 11 U.S.C. §523(a)(2)(A) allow an adversary proceeding based upon a debtor's entry into a conspiracy to transfer fraudulently assets owned jointly with the debtor's spouse or with insiders in order to defeat a creditor's judgment?

2. Are allegations of a conspiracy to enter into fraudulent acts to defeat a judgment, which specify that the debtor and his spouse engaged in effective transfers of specific assets, held by one or the other or by insiders, which assets have not been recorded or disclosed in bankruptcy schedules, and which assets include a promise to satisfy a creditor's judgment made to a state court without intention to perform, sufficient to obtain discovery under Rules 8 and 9(b) of the Federal Rules of Civil Procedure?

3. Is a State Court Order based on promises made by a debtor in a state collection proceeding to make payments upon the debt dischargeable as a matter of law, notwithstanding the Doctrine of Judicial Estoppel and notwithstanding allegations that the debtor's promise has been made with an intention to evade payment of the judgment?

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OPINION BELOW

There are no published opinions below pertaining to petitioner William B. Rooz and respondent David Kimmel. The only *related* opinion below is one involving David Kimmel's wife, Roberta Kimmel, which is reported at 378 B.R. 630, 2007 DJDAR 17265, and 367 B.R. 166.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 2008. Petitioner filed a petition for rehearing on December 8, 2008, and that petition for rehearing was denied by the court of appeals on December 23, 2008. The Petition for Writ of Certiorari was filed on March 13, 2009.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) which provides that cases in the courts of appeals may be reviewed by the Supreme Court by a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional provisions involved in this petition.

The only statutory provisions involved are 11 U.S.C. §523(a)(2)(A) which provides that a bankruptcy discharge does not discharge an individual debtor

oral argument the bankruptcy court granted respondent's motion to dismiss, but this time without leave to amend.

Thereafter, Rooz appealed to what is called the Bankruptcy Appellate Panel for the Ninth Circuit ("the BAP"), and later he appealed to the Court of Appeals for the Ninth Circuit. After written briefing and oral argument, both of those appellate courts affirmed the dismissal decision of the bankruptcy court. [A copy of the BAP's decision can be found in Appendix B to Rooz's petition, and a copy of the Ninth Circuit's decision can be found in Appendix A to Rooz's petition.]

Rooz now seeks relief through this Petition for Writ of Certiorari.

ARGUMENT

Both the BAP and the court of appeals were correct in their decisions to deny any relief to Rooz. There is absolutely no merit to his claim of nondischargeability.

I. ROOZ HAS NOT SPECIFIED ANY FRAUD IN CONNECTION WITH THE 1995 STATE COURT JUDGMENT.

As indicated above, the bankruptcy court dismissed Rooz's nondischargeability fraud claim on the ground

that Rooz had failed to allege specific acts of fraudulent conduct on the part of respondent as related to the state court judgment that Rooz had obtained against respondent in 1995.

In this petition, Rooz concedes that his adversary proceeding complaint lacked specific allegations of fraud as required by Fed. R. Civ. Pro. 9(b), which states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Instead, what Rooz is claiming in this petition is that the bankruptcy court erred by not allowing him to conduct discovery so that he could "find" the fraud that he was looking for to support his nondischargeability adversary proceeding complaint. But such argument puts the cart before the horse. Rule 9(b) requires a pleading of fraud or mistake with particularity ***first***, before one is allowed to conduct discovery. This is a basic pleading requirement that has existed in the federal rules of civil procedure for many years.

It is true that in certain cases the trial court may afford a plaintiff a limited opportunity to conduct discovery for the purpose of pleading fraud, but this occurs only after the plaintiff makes a showing that such discovery is likely to develop the facts needed for such pleading. [*Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993); *Emery v. American Gen. Finance, Inc.*, 134 F.3d 1321, 1323 (7th Cir. 1998).] But Rooz made no such showing in the present case, despite being given repeated opportunities to do so.

Indeed, in this petition and in the various court proceedings below, Rooz has never articulated any fraud on the part of the respondent in connection with the 1995 state court judgment. Common sense tells us that as the judgment creditor, Rooz is the person most knowledgeable of such fraud, if any occurred. Common sense also tells us that Rooz's failure to specify any fraud in his pleadings is clear and convincing evidence that ***no fraud actually occurred***.

II. A NONDISCHARGEABILITY CLAIM UNDER §523(a)(2)(A) CANNOT BE USED TO ASSERT AN OBJECTION TO DISCHARGE UNDER §727(d) IN WHICH IT IS ALLEGED THAT THE DEBTOR FAILED TO DISCLOSE ASSETS OR FAILED TO TURN OVER PROPERTY OF THE BANKRUPTCY ESTATE.

In bankruptcy, there are two forms of discharge objections. One form is an objection that a particular debt should be determined nondischargeable, such as, for example, wherein it is alleged that the debt occurred as the result of fraud on the part of the bankruptcy debtor. Authority for this type of nondischarge is found in 11 U.S.C. §523(a)(2)(A).

A second type of nondischarge arises when a creditor or other party in interest contends that the debtor has committed a bankruptcy fraud. A bankruptcy fraud occurs when the debtor fails to disclose fully his or her bankruptcy assets or has made

false statements in the debtor's bankruptcy filings. Authority for this type of nondischarge is found in 11 U.S.C. §727(d).

In Rooz's case, he alleged on a claim under the nondischargeability statute, §523(a)(2)(A). He never filed an adversary proceeding complaint under §727(d), and his attempt to use the §523(a)(2)(A) procedure to assert an objection to discharge under §727(d) was untimely because §727(e) contains a one-year statute of limitations for a §727(d) claim. That one-year deadline has long passed. Furthermore, to the extent that Rooz is claiming an objection to discharge pursuant to §727(a), which excepts from discharge a debtor who, for example, has concealed property of the estate, or who has failed to preserve financial records, or who has refused to obey a lawful order of the bankruptcy court, such an objection to discharge must be filed within 60 days from the date of the first meeting of creditors, as required by Bankruptcy Rule 4004(a). That 60-day deadline has also long passed.

Thus, the only claim that Rooz can timely assert is one under §523(a)(2)(A), but that claim requires particularity pleading, which Rooz has failed to allege, as noted above.

III. NO VIABLE FRAUDULENT TRANSFER CLAIM HAS BEEN PLEADED.

Throughout all of these proceedings, including the bankruptcy court, before the BAP, in the Ninth

Circuit, and now in this Court, Rooz has repeatedly argued that he should be allowed to assert a fraudulent transfer claim, and in support thereof he has cited a Seventh Circuit case entitled *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000).

As respondent has explained in his previous appellate briefs on this issue, there is nothing remarkable about the *McClellan* case. Both the bankruptcy code and California law provide creditors with a remedy in the event there is proof of a fraudulent transfer of assets occurring prior to the commencement of a bankruptcy case. [See, 11 U.S.C. §548; see also, the California version of the Uniform Fraudulent Transfer Act, which can be found at California Civil Code §3439.]

The problem with Rooz's fraudulent transfer argument is the same problem that he has with respect to his fraud pleading in connection with his 1995 state court judgment. He has failed to state exactly what facts would give rise to a fraudulent transfer claim. He has not specified the date of the transfer, what kind of transfer occurred, a description of the property that was transferred, the name of the transferee, or any other particulars. Such specificity is required by Rule 9(b). Indeed, nowhere in Rooz's pleadings does he even attempt to allege a fraudulent transfer claim.

For instance, Rooz briefly discusses this fraudulent transfer issue on pages 8 and 9 of his petition, but in that discussion there in no attempt to describe

a fraudulent transfer. Why? The answer is obvious, ***there was no fraudulent transfer***, and to utter the two words "fraudulent transfer," without any supporting facts, does not establish a fraudulent transfer cause of action.

In Rooz's petition to this Court, he has made no attempt to remedy this obvious pleading defect. All he has done is cite to the *McClellan* case. The respondent respectfully submits that the citation to a case that states an undisputed point of law is not sufficient to allege a nondischarge cause of action cognizable in federal bankruptcy court.

As the respondent has argued in the courts below, no matter how one approaches Rooz's fraudulent transfer argument, whether the word "conspiracy" is used, or the words "fraudulent transfer" are used, or the general word "fraud" is used, the result is the same. Rooz's pleadings are inadequate to state a fraud claim under the specificity requirements of Rule 9(b), and the bankruptcy court was correct in rejecting them, and so was the BAP and the Ninth Circuit in affirming the bankruptcy court's decision on this issue.

And keep in mind this: When bankruptcy courts review a nondischargeability claim under §523(a)(2)(A), what the court reviews are the facts alleged in the underlying case, such as Rooz's 1995 state court judgment. It is fraud committed in that underlying case that counts. Allegations that the debtor failed to disclose all of his or her assets in his or her bankruptcy schedules, or has engaged a fraudulent transfer prior

to bankruptcy, or has committed some other form of bankruptcy fraud may be relevant in an objection to discharge proceeding under §727, ***but it is totally irrelevant to a nondischargeability proceeding under §523(a)(2)(A)***.

IV. BANKRUPTCY PROCEDURE DOES NOT AUTHORIZE THE ADDITION OF A NONDEBTOR PARTY TO A CREDITOR'S NONDISCHARGEABILITY CLAIM UNDER §523(a)(2)(A).

On page 11 of his petition, Rooz argues, as he did in the courts below, that he should have been given the right to add respondent's wife as a party defendant to Rooz's §532(a)(2)(A) nondischargeability case. On this point, Rooz is clearly mistaken.

There is no procedure in bankruptcy that allows a creditor to add a nondebtor person or entity such as the debtor's spouse to a §523(a)(2)(A) nondischargeability case. The sole purpose of a §523(a)(2)(A) nondischargeability case is to obtain a determination that a particular debt owed by the debtor is nondischargeable. There is nothing in that statute, and there is nothing in related Bankruptcy Rule 4007, that in any way grants the bankruptcy court authority to add a nondebtor spouse to such a proceeding. Whether the nondebtor spouse committed fraud or engaged in a fraudulent transfer of some kind or is concealing assets belonging to the bankruptcy estate is totally irrelevant to the issue of whether the debtor

committed some fraudulent act or omission in the underlying case (here, e.g., the 1995 state court judgment) which would warrant a finding that the debt owed to the creditor is nondischargeable.

On page 11 of Rooz's petition he cites several cases, including this Court decision in *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 61 S. Ct. 904, *rehearing denied* (1941), for the proposition that parties may be added to a bankruptcy proceeding. But none of those cases involves the limited scope of a nondischargeability case under §523(a)(2)(A).

Furthermore, as will be pointed out in Roberta Kimmel's opposition to Rooz's petition against her in this Court, which is Case No. 08-1157, Roberta Kimmel herself filed a voluntary Chapter 7 petition in 1993 and thereafter she received a discharge which embraced the failed real estate transaction which ultimately led to the state court judgment that Rooz obtained two years later in 1995 against Roberta Kimmel's husband, the respondent. This means that any claim that Rooz has against Roberta Kimmel is barred by 11 U.S.C. §524(a)(3), which enjoins the holders of pre-petition community claims from collecting or recovering from community property acquired by a discharged debtor post-petition. This is exactly what the situation is here with respect to the respondent's spouse, Roberta Kimmel.

CONCLUSION

The whole purpose of a Chapter 7 bankruptcy proceeding is to discharge one's debts and to obtain a fresh start. The exceptions to discharge are extremely limited, and the procedures that must be followed to obtain exceptions to discharge are very precise and are strictly enforced. There is nothing special about Rooz's claim that would warrant any deviation from that well-established and well-defined procedure.

Equally important, Rooz's petition raises no significant issues that demand the attention of this Court and its limited resources. There is no conflict among the circuit courts that needs to be resolved, there is no alarmingly new point of bankruptcy law that has been advanced by the courts below, and there is no issue of great national importance raised in this petition that needs this Court's attention.

For all of these reasons, Rooz's Petition for Writ of Certiorari should be denied.

Dated: April 15, 2009

Respectfully submitted,

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David Kimmel